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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

TELEPHONE COORDINATING COUNCIL TCC-1, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Petitioner*,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA AND THE DIAMOND STATE TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, CINCINNATI BELL INC., MICHIGAN BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, INCORPORATED, WISCONSIN TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY AND BELL TELEPHONE COMPANY OF .. NEVADA, COMMUNICATIONS WORKERS OF AMERICA, AND ALLIANCE OF INDEPENDENT TELEPHONE UNIONS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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crimination, the court of appeals has (a) decided an important question of federal law which has not been but should be settled by this Court; (b) rendered a decision in conflict with decisions of the Second Circuit on the legality of "remedial" promotion quotas; and (c) decided a federal question in a manner inconsistent in principle with this Court's decisions in Griggs v. Duke Power Co., 401 U.S. 424, 430-31; McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273; International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977); Trans World Airlines, Inc. v. Hardison, 97 S.Ct. 2264 (1977); H. K. Porter Co. v. NLRB, 397 U.S. 99 18

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JAMES D. HODGSON, Secretary of Labor, United States Department of Labor, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Telephone Coordinating Council TCC-1, International Brotherhood of Electrical Workers ("IBEW Council") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on April 22, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. 1-29 [1]) is not yet officially reported but is unofficially reported at

[1] The Appendix to this Petition is presented in a separate volume, designated herein: "App." This Appendix has been filed jointly by the IBEW Council, the Communications Workers of America ("CWA"), and the Alliance of Independent Telephone Unions ("Alliance"). These three labor organizations, who were parties below, have filed separate petitions for certiorari seeking reversal of the judgment of the court of appeals. The three petitions are consecutively numbered.

14 FEP Cases 1210. The opinion of the District Court for the Eastern District of Pennsylvania (App. pp. 35-118) is reported at 419 F. Supp. 1022.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1977. A timely petition for rehearing was denied on May 16, 1977 (App. pp. 32-33). This petition for certiorari is being filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Title VII of the Civil Rights Act of 1964, as amended, permits the preferential granting of job vacancies to *non-victims* of discrimination in disregard of "bona fide seniority systems" within the meaning of Section 703(h), pursuant to a consent decree embodying an agreement between U.S. government agencies and a private company intended to "remedy" the effects of past discrimination by correcting an imbalance in the race, ethnic and sex composition of certain jobs in the workforce of the company;

2. Whether Sections 703(a) and (j) of Title VII of the Civil Rights Act of 1964, as amended, and/or the Constitution permit the preferential granting of job vacancies to non-victims of discrimination because they belong to certain race, sex and ethnic groups to the detriment of employees who belong to other race, sex, and ethnic groups, pursuant to a consent decree embodying an agreement between U.S. government agencies and a private company intended to "remedy" the effects of past discrimination by correcting an imbalance in the racial, ethnic and sex composition of certain jobs in the workforce of the company;

3. Whether the National Labor Relations Act, as amended, and the national labor policy permit an agreement between U.S. government agencies and a private com-

pany, and the judicial entry of a consent decree approving such agreement, which, over the objection of the collective bargaining representatives, abrogate the terms of collective bargaining agreements or dictate the terms of mandatory subjects of collective bargaining, where such "relief" *is not required* for compliance with Title VII or Executive Order 11246, nor to remedy violations thereof, and alternative remedies exist which will comply with federal law and promote both equal employment opportunity and collective bargaining.

STATUTES INVOLVED

The pertinent portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq.—Sections 703(a), 703(h), 703(j), 706(g)—; Executive Order 11246—Sections 202(1) and (2), 207, 209—; and the Constitution of the United States—the due process clause of the Fifth Amendment—are reproduced at the end of this petition, as an addendum.

STATEMENT OF THE CASE

A. Nature of the Proceedings Below.

On January 18, 1973, the Equal Employment Opportunity Commission ("EEOC"), the Secretary of Labor, and the United States, filed a complaint in the District Court for the Eastern District of Pennsylvania charging the American Telephone & Telegraph Company and its associated operating companies (collectively "AT&T") with having engaged in discriminatory employment practices against women, blacks, and other minorities in violation of Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e *et seq.*), Executive Order 11246, and the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*).[2] In

[2] Jurisdiction was asserted under Sections 706(f)(1) and (3) and 707(e) of Title VII (42 U.S.C. §§ 2000e-5(f)(1) and (3), 2000e-6(e)), Section 17 of the FLSA (29 U.S.C. § 217), and 28

its answer, filed the same day, AT&T denied these charges.[3]

Simultaneously with the filing of the complaint and answer in the district court, the government parties and AT&T consented to a decree embodying a "memorandum of agreement" negotiated among them. This consent decree was on the same day approved and entered by the district court.[4] The Unions representing the various bargaining units of employees of AT&T, namely the IBEW Council, Communications Workers of America ("CWA"), and the Alliance of Independent Telephone Unions ("Alliance") were not parties to the consent decree.[5]

To protect their interests in the operation and enforceability of the seniority systems contained in various collective bargaining agreements with AT&T, and to preserve their collective bargaining prerogatives with AT&T, generally, the Unions moved to intervene. CWA's motion at first denied, was ultimately granted. See 365 F. Supp. 1105 (E.D. Pa. 1973), *modified*, 506 F.2d 735 (3d Cir. 1974).

U.S.C. §§ 451, 1343 and 1345. The Complaint is set out in the joint appendix of the parties in the court of appeals ("JA"), pp. 6-22.

[3] JA, pp. 23-28.

[4] This action grew out of the intervention by EEOC in a 1970 telephone rate increase proceeding filed by AT&T with the Federal Communications Commission, wherein EEOC sought to prevent any rate increase unless AT&T adopted a suitable affirmative action program to counteract the effects of its alleged employment discrimination. Testimony on such allegations was taken by the FCC. That proceeding, like this action, was voluntarily resolved among the government agencies and AT&T with the adoption of the agreement approved by the district court. See App. 6-7.

[5] These three labor organizations, and/or their affiliates, represent all or substantially all union-represented employees of AT&T and its operating companies. While prior to January 18, 1973, the government parties offered CWA and the IBEW Council an opportunity to convey their positions on the consent decree in separate discussions with the Government, none of the Unions were allowed to participate in the negotiations, and their consent was not considered necessary either by the Government or AT&T. Cf. App., p. 6.

The motions of the IBEW Council and the Alliance to intervene were granted in July, 1975.[6]

The Unions filed petitions in the district court to modify the consent decree, and the underlying agreement. In addition, CWA sought a preliminary injunction to restrain the operation of certain portions of the consent decree and the underlying agreement, pending a determination of the Unions' petitions to modify. The IBEW Council moved for summary judgment supported by affidavits.

On their part, government plaintiffs and AT&T petitioned the district court to enter a supplemental order which had been negotiated among them and was designed to correct alleged deficiencies in the 1973 and 1974 implementation of the consent decree by AT&T.

On August 20, 1976, more than one year after submission of these matters to the district court, the court denied the Unions' petitions and motions, and granted the petition of the government and AT&T for the entry of the supplemental order. 419 F. Supp. 1022.[7]

The Unions appealed, and on April 22, 1977, the Court of Appeals for the Third Circuit affirmed the judgment and orders of the district court. On May 16, 1977, the Unions' joint petition for rehearing and suggestion for rehearing *en banc* was denied, six members of the court not participating.[8]

B. The Consent Decree and Supplemental Order.

The consent decree and supplemental order negotiated

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[6] JA, pp. 661-662. The IBEW Council is composed exclusively of those IBEW local unions which are the collective bargaining representatives of approximately 70,000 non-management employees of eight operating companies of AT&T. App., p. 45.

[7] App. pp. 119.

[8] The order denying rehearing indicated that the only members of the court who did "participate in the petition for rehearing" were the original panel (App. p. 32). The Clerk subsequently advised counsel that the other members of the court "recused themselves in this matter" (App. p. 34).

among the government plaintiffs and AT&T and approved by the district court, are intended to correct "a concentration of males and females in certain classifications" and "an imbalance between the racial and ethnic composition of the work forces of many operating companies and the racial and ethnic makeup of their available labor markets." (App., p. 8.)

1. *Consent Decree*—In pertinent part, the January 18, 1973 consent decree establishes a system of priorities for the filling of job vacancies at AT&T operating companies which conflicts with the standards contained in the collective bargaining contracts applicable to the selection of candidates for promotion and transfer.

Under the contractual standards, candidates are evaluated on the basis of relative qualifications and net credited service (company seniority), and when two or more candidates have substantially equal qualifications, company seniority governs. (Affidavit of Oliver R. Taylor, Director—Labor Relations, AT&T, App. pp. 194-95.)

Under the consent decree, however, the Bell Companies are directed to establish "goals" and "intermediate targets" for the selection, within prescribed "time frames", of specified percentages of minorities and women (and in the case of certain clerical and operator jobs, males) in 15 "job classifications" of which numbers 5 through 15 encompass non-management, bargaining unit jobs. Of these, some are designated "entry level", others "semi-skilled", and still others "skilled".[9]

When any Bell Company is unable to achieve or maintain the intermediate target rate for any pertinent race, sex or

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[9] According to AT&T,

"targets and goals agreed to by AT&T were required and approved by the EEOC, Department of Labor, and Department of Justice in order to achieve the proportionate utilization of minorities, women and white males in the job classifications 5-15 relative to their availability in the workforce." (Affidavit of Lee A. Satterfield, AT&T attorney, App. p. 200.)

ethnic group by applying normal contractual selection standards, it is required to depart from those standards and select candidates belonging to the pertinent race, sex or ethnic groups in preference to competing candidates with greater seniority and/or better qualifications of other race, sex or ethnic groups. In this situation, the selection is made quite without regard to whether the preferred candidate was ever an actual victim of discrimination. And where necessary to find a candidate from the preferred race, sex or ethnic group, the company is required to choose a new-hire who may be of an age too young to have been alive when the dispreferred employee was hired.[10]

The affidavit of Donald E. Liebers, AT&T's personnel director for employment and equal opportunity, demonstrates the extensive use of this so-called "affirmative action override" by the operating companies in the two years following the entry of the decree. He states that in 1973 and 1974, "override"—the selection of employees based on race, sex or national origin in disregard of the selection standards contained in collective bargaining agreements—was used a total number of 28,856 times in the course of filling 112,518 vacancies in job classifications 5-15. (Table I of Affidavit of Donald E. Liebers, App. p. 198.)

Pleadings filed by the Unions in the district court pro-

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[10] As the government plaintiffs stated in the district court:

> "The defendant employers are required by the terms of the consent decree to override seniority and qualifications in filling vacancies, where such action is necessary to meet the goals and intermediate hiring and promotion shares established pursuant to the Decree." (JA 478.)

Or, as stated by AT&T:

> "It was the understanding of AT&T that the Consent Decree required the companies to override employee selection standards contained in the collective bargaining agreements with the Intervenors in order to reach targets and goals approved by the Government in 1973." (Affidavit of Donald E. Liebers, App. p. 197.)

vide examples of specific applications of the override requirement in 1973 and 1974: A vacancy in a job title known as "operations clerk" in the plant department of the New Jersey Bell Telephone Company was awarded to a white male *new-hire*. In doing so, the Company rejected the application for *promotion* to such job of a female incumbent employee with approximately *10 years service* with the Company who was employed as a Records Clerk, and whom the Company previously had designated as qualified for Operations Clerk. The reason given by the Company for rejecting the qualified, long-term employee in favor of a new-hire was that the job title of operations clerk fell within job classification no. 11 of the decree, in which an intermediate target and goal was established for white males. (Affidavit of Arthur Perry, Jr., App., pp. 203-04.)

At the New England Telephone Company, the decree resulted in awards of job vacancies to new hires in preference to incumbent employees applying and entitled to the vacancies under the collective bargaining agreement in effect at such Company. (See Exhibits A-1-A-3 to Affidavit of Robert A. Nickey, App., pp. 206, 209-16.)

2. *Supplemental Order*—In an interim report to the district court on compliance with the consent decree, it was shown that in a number of specific categories, the Bell Companies fell short of attaining intermediate targets promulgated for 1973.[11] The government plaintiffs and AT&T jointly moved for the entry of a supplemental order to remedy deficient target performance and assure future achievement of targets and goals.

The supplemental order created a new set of race, sex and ethnic groups known as "deficient groups" to go along with the "underutilized groups" in the consent decree. The order established specific priority placement procedures ("carry-forward" procedures) for members of such de-

[11] AT&T disclaimed any noncompliance with the consent decree.

ficient groups to compensate for deficiencies in the achievement of targets for previous years in certain establishments in certain job classifications.[12] For a two-month period ending on October 24, 1976, some Bell Companies were required to make all placements in affected job classifications from deficient race, sex and ethnic groups. Thereafter, priority placement was to be given to deficient group members on the basis of a mathematical formula defining the relationship between the priorities to be accorded deficient group members and those to be accorded underutilized group members, as well as the relationship between members of those preferred groups and non-underutilized group members. Deficient group members do not have to be actual victims of discrimination or of non-compliance with the decree to be entitled to preference based on race, sex or national origin.[13]

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[12] The "carry-forward" placement procedures were to expire on December 31, 1976 except to the extent that some establishments were unable to eliminate 1973 deficiencies by that date because of insufficient placement opportunities. It is assumed that in accordance with this qualification, the carry-forward procedure is still in effect.

[13] The mathematical detail of the "carry-forward procedure" in the supplemental order is reflected by the following language:

> "Where the deficiencies in a job classification have not yet been eliminated but there are no more qualified members of deficient groups meeting all of the criteria in paragraph B, 1, above, or qualified employees and applicants entitled to priority placement under paragraph B, 3, above, or where the limitations of paragraph B, 3 or 5 are applicable, the remaining opportunities for the calendar quarter will be allocated as follows:
>
> a. Each race, sex, and ethnic group still deficient (beginning with any who, in 1974, met the criteria of subparagraph B, 1, a-d, above) will receive a proportionate share of the remainder of the estimated placements for each calendar quarter after applying subparagraphs 4, b, and c, below, such proportion to be calculated on the basis of each deficient group's share of the remaining deficiencies and to be greater than their Goals II percent allocation;
>
> b. In any calendar quarter where placements are made to

The supplemental order compounds the "override" aspect of the consent decree in another substantial respect. Whereas the decree provides that efforts to achieve intermediate targets should be "substantially uniform throughout the appropriate [one-year] time frame" (App. p. 127), the supplemental order provides for the use of "override" within much more narrow time frames and on a more inflexible basis, so as to guarantee that companies are always "on schedule". What was established in the decree as a system requiring priorities over an *annual* period of time, has been transformed into one requiring priorities on a quarterly basis, or, at the option of the companies, *whenever* a target is not being met. Thus, it is provided that the override "shall" be employed "(a) at any point in a quarter when [the companies] conclude that such use is necessary to meet intermediate targets, or (b) in quarters following the end of any quarter when a company is failing to meet any intermediate target in such classification and establishment and until such target is being met for the year." (App. 159-60.)

The practical effect of the consent decree as modified by the supplemental order was described by AT&T in the district court as follows:

> "As implementation of the Decree continues and is reinforced by implementation of the Supplemental Order, the number of situations in which contract selection standards are overridden will increase. Moreover, it must be acknowledged that opportunities cannot be provided to minorities and others on the accelerated basis called for under the Decree and Supplemental Order without significantly restricting and delaying

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groups at ultimate goal, race, sex, and ethnic groups not deficient but below proper utilization will receive each group's normal Goals II allocation of the remaining placements for the calendar quarter;

c. No more than one-third (33⅓ percent) of the remaining placements in such classification will be made to groups at ultimate goal." (App. pp. 150-51.)

the hitherto lawful expectations of others arising out of collective bargaining agreements." (JA 501.)

REASONS FOR GRANTING THE WRIT

Five weeks after the court below entered its judgment in the instant case, this Court decided *International Brotherhood of Teamsters* v. *United States*, 97 S.Ct. 1843 (1977) and *United Air Lines, Inc.* v. *Evans*, 97 S.Ct. 1885 (1977).[14] Since the court below did not have the benefit of those decisions, which overruled the case law on seniority remedies under Title VII developed in the lower federal courts, this Court might be inclined summarily to vacate the judgment below and remand for reconsideration in light of those decisions. There are strong reasons, however, why it would better serve the interests of justice for this Court to grant the petition and set the case down for plenary consideration:

1. For the reasons discussed *infra*, this case presents two other questions not addressed in the recent decisions of this Court, as to which certiorari should be granted. One involves the statutory (Title VII) and constitutional propriety of "remedial" employment quotas—where non-victims belonging to certain race, sex and ethnic groups are granted preferences to the detriment of members of other race, sex and ethnic groups. The second involves the conflict with our national labor policy resulting from an agreement between the government and AT&T, over the objection of the Unions, unilaterally abrogating terms of collective bargaining agreements and dictating other terms of mandatory subjects of collective bargaining where such "relief" is not *required* for compliance with federal law or to remedy violations thereof. As regards both issues, the decision of the court below conflicts with the decision of another court of appeals, and is inconsistent in principle

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[14] *Trans World Airlines* v. *Hardison*, the third case upon which we rely, was decided June 16, 1977. 97 S.Ct. 2264 (1977).

with earlier decisions of this Court.

2. Underlying all three questions presented herein is an additional issue decided adversely to petitioner in the court below but not previously decided by this Court. This issue is whether Executive Order 11246 can be used as an independent legal basis for requiring private contractors to grant employment preferences based on race, sex and national origin in disregard of "bona fide seniority systems" protected by Section 703(h). The U.S. Department of Labor, which enforces the Executive Order, recently has asserted that, the Supreme Court's decisions in *Teamsters*, *Evans* and *Hardison* notwithstanding, the Executive Order will continue to be applied to require employers to override seniority systems which perpetuate the effects of past discrimination. Supreme Court review at this time is necessary to insure that an executive order is not misapplied by government agencies so as to undermine an express congressional policy, and to prevent circumvention of this Court's decisions as regards the many seniority systems in collective bargaining agreements with government contractors.

3. Regardless of how the court below would decide the instant case upon a remand, this Court ultimately would be urged to grant review. This is because of the legal and practical importance of the issues and the factual framework in which they arise. The consent decree, objected to in part by the Unions, was described by the district court as the "largest and most impressive civil rights settlement in the history of this nation"[15]. It applies nationwide to "one of the largest employers in the United States" (App. p. 7). At the same time, it requires the repeated violation of collective bargaining agreements covering 730,000 employees, the largest number of employees so affected at one time. Moreover, the decree is regarded by federal government agencies as the model to be used in

[15] 365 F. Supp. 1105, 1108 (E.D. Pa. 1973).

American industry to promote equal employment opportunity, pursuant to voluntary affirmative action programs or imposed federal court decrees.

4. In 1973 and 1974 alone, the consent decree resulted in more than 28,000 occasions when job vacancies were filled on the basis of race, sex and ethnic preferences rather than contractual standards. If the Unions ultimately prevail in this case, a vast restructuring of employee job movements occasioned by the consent decree and supplemental order may be necessary. Already, long delays have attended this litigation since the consent decree was first entered and became effective in January 1973. For this Court to remand the case to the court of appeals which might decide to remand it to the district court, would result in additional substantial delays. These additional delays would increase the practical difficulties and exacerbate the human dislocations resulting from the undoing of selections made in contravention of Title VII. It is, therefore, desirable that all of the parties directly affected—the government, company, unions and employees—should know the legal status of the decree and supplemental order as soon as possible.

I. In approving a decree and supplemental order which grant "relief" to non-victims of discrimination, in disregard of "bona fide seniority systems" within the meaning of Section 703(h) of the Civil Rights Act of 1964, as amended, the court of appeals' decision conflicts with the decisions of this Court in International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977); United Air Lines, Inc. v. Evans, 97 S.Ct. 1885 (1977); and Trans World Airlines, Inc. v. Hardison, 97 S.Ct. 2264 (1977).

The consent decree and supplemental order entered by the district court requires AT&T, in filling job vacancies,

to disregard contractual seniority systems [16] in violation of collective bargaining agreements, notwithstanding the fact that such systems are "bona fide" within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964, as amended.[17] This action by the Company and the district

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[16] The courts below make much of the fact that the contractual seniority systems at AT&T do not base selection purely on seniority but on qualifications and seniority. (App., pp. 10-12, 59-60.) Not only is this legally irrelevant, but it misconceives the normal nature of seniority systems and the collective bargaining framework within which such selection criteria operate.

The seniority provisions at issue are typical. The Bureau of Labor Statistics reports that "nine-tenths of the agreements having promotion provisions, covering the same proportion of workers [nine-tenths], stipulated that factors in addition to seniority would be considered. . . . [T]he nonseniority factors most frequently encountered—skill and ability—occurred in about three-fourths of the agreements", and "qualifications" not further defined occurred in virtually all remainder. "Major Collective Bargaining Agreements—Seniority in Promotion and Transfer Provisions" (Bulletin 1425-11, U.S. Department of Labor, BLS (March 1970), pp. 7-10.) It would undermine *Teamsters* completely to contend that the protection of Section 703(h) does not extend to "bona fide" systems wherein seniority is coupled with qualifications. In any event, the language of Section 703(h) refers "to a bona fide seniority or *merit* system", thereby clearly contemplating the type of selection systems present here.

Secondly, through the grievance procedures, and also (in a number of the contracts) in binding arbitration, an award made by the Company based on qualifications to a less senior employee can be challenged and changed. This is particularly true with regard to those contracts providing that seniority is the determinative factor where qualifications are *reasonably or substantially* equal (JA, pp. 266, 277). See, e.g., *Matter of Southern Bell Telephone Co.*, 16 LA 1 (1951); *Matter of AT&T Co.*, 25 LA 256 (1955); *Matter of New Jersey Bell Telephone Co.*, 47 LA 496 (1966); *Matter of South Central Bell Telephone Co.*, 60 LA 465 (1973); *Matter of Mountain States Telephone Co.*, 64 LA 316 (1974); *Matter of Southwestern Bell Telephone Co.*, reported in Stone Baderschneider, *Arbitration of Discrimination Grievances*, p. 57 (American Arbitration Association, 1974).

[17] As the district court correctly noted, "the 'bona fides' of the defendants' seniority system are not at issue in this proceeding" (App. p. 59n. 15). No evidence was produced prior or subsequent to the entry of the consent decree, to show a design or intention to

court's exercise of equitable power under Section 706(g) in approving and requiring such action, are squarely inconsistent with the decisions by this Court in *International Brotherhood of Teamsters* v. *United States*, 97 S.Ct. 1843 (1977); *United Air Lines, Inc.* v. *Evans*, 97 S.Ct. 1885 (1977); and *Trans World Airlines, Inc.* v. *Hardison*, 97 S.Ct. 2264 (1977).

International Brotherhood of Teamsters v. *United States*, *supra*, like the instant case, was a suit brought by the Government under Tile VII [18] in which relief requiring the override of contractual seniority systems was granted by the lower courts on the ground that such systems unlawfully perpetuated the employer's pre-and post-Act discrimination in hiring and initial job assignments. Beneficiaries of this relief in *Teamsters* consisted of all persons belonging to the affected racial and ethnic groups who were hired during the period when the discriminatory policy was in force.

This Court vacated the judgment and remanded on the ground that Section 703(h) "immunizes all bona fide seniority systems, and does not distinguish between the perpetuation of pre- and post-Act discrimination." 97 S.Ct. at 1861, n. 30. The Court further held that "those employees who suffered only pre-Act discrimination are not entitled to relief, and no person may be given retroactive seniority to a date earlier than the effective date of the Act." 97 S.Ct. at 1865. *Teamsters*, therefore, clearly stands for the proposition that only *actual victims* of post-

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discriminate or disguise discriminatory practices in the negotiation of the seniority systems. AT&T admitted the non-discriminatory language and purpose of the seniority provisions (AT&T's Reply to Intervenors' Opposition, etc., pp. 7-8), and government plaintiffs did not contest these facts.

[18] The implications for the instant case of Executive Order 11246 are referred to *infra*, n. 19. The third leg of the government's suit here—the FLSA—was not relied upon by the lower court or the parties to support the "relief" at issue.

Act discrimination are entitled to relief which is otherwise inconsistent with the provisions of bona fide seniority systems protected by Section 703(h). The decision of the court below in the instant case, wherein "relief" is provided by the decree and supplemental order to persons even further removed from the status of actual victims than those held not entitled to relief in *Teamsters*, cannot stand in the light of that decision.

No less of a conflict exists between the decision of the court below and the decisions of this Court in *United Air Lines, Inc.* v. *Evans, supra*, and *Trans World Airlines* v. *Hardison, supra*. Contrary to *Evans*, to the extent the consent decree and supplemental order may provide relief to some actual victims of the Company's alleged past discrimination, they do so by overriding bona fide seniority systems to prevent the perpetuation of *pre-Act* discrimination, or discrimination which was not made the subject of a timely (if any) charge. "A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." 97 S.Ct. at 1889. And contrary to *Hardison*, the consent decree and supplemental order override bona fide seniority systems so as to provide preferential treatment to members of certain race, sex and ethnic groups. "Title VII does not contemplate such unequal treatment." 97 S.Ct. at 2275.[19]

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[19] The court below, in addition to rejecting the Unions' argument based on the meaning of Section 703(h) of Title VII, relied upon "the fact that in this case the United States sued to enforce Executive Order No. 11246" (App., p. 16). Referring to its own earlier decision in *Contractors Association of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), the court described the Executive Order as

> "a valid effort by the government to assure utilization of all segments of society in the available labor pool for government contractors, entirely apart from Title VII. Certainly that broader governmental interest is sufficient in itself to justify relief directed at classes rather than individual victims of

discrimination. It is undisputed that the Bell System is a major governmental contractor." App., p. 17.

The Executive Branch is without power to act or require action in a manner, inconsistent with the public policy of the United States as constitutionally expressed in a congressional enactment. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). This Court has found the pertinent policy expressed in Section 703(h) of Title VII. *Teamsters, supra; Evans, supra; Hardison, supra.*

Beyond that, the court of appeals' description of the substantive purpose of the Executive Order is open to serious question. Nothing in the language of the Executive Order requires or authorizes racial, sex or ethnic preferences, remedial or otherwise. Indeed, the Executive Order requires that "the contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin", and that "all qualified applicants will receive consideration for employment without regards to race, color, religion, sex or national origin." Section 202(1), (2).

Reliance by the court below on the Executive Order as an independent basis for relief beyond the scope of that authorized by Title VII is also questionable in light of the recitation in Section 209 of the available sanctions and penalties for enforcement of the Order. Section 209 provides that the Department of Justice may bring "appropriate proceedings . . . including the enjoining, *within the limitations of applicable law*, of organizations, individuals, or groups" who prevent compliance with the Order. The "applicable law", we submit, is Title VII.

The error of the court below in relying on Executive Order 11246 to sustain the consent decree and supplemental order in the instant case now has been generalized by the U.S. Department of Labor which administers the Executive Order. In a memorandum issued after this Court's decisions in *Teamsters*, *Evans* and *Hardison*, dated July 20, 1977, to the sixteen federal agencies having compliance responsibilities under the Order, the Department directed that "compliance officers conducting compliance reviews pursuant to the Executive Order shall continue to require adjustments in job or departmental seniority." This position by the Department was based upon its conclusion that "the Executive Order does not contain an exemption comparable to § 703(h), and our view of the Teamsters case is that it is a narrow decision based on the exemption." BNA Daily Labor Report, July 28, 1977, pp. A-10-11.

The broad impact of the Department of Labor's position on government contractors and their employees is an additional reason for this Court to grant review of the lower court's erroneous decision of this issue and of the broader question involving the

II. In approving a decree and supplemental order which require the preferential granting of employment opportunities to specified percentages of members of certain race, sex and ethnic groups, to the detriment of members of other race, sex and ethnic groups, without regard to whether the preferred persons are victims of discrimination, the court of appeals has (a) decided an important question of federal law which has not been but should be settled by this Court; (b) rendered a decision in conflict with decisions of the Second Circuit on the legality of "remedial" promotion quotas; and (c) decided a federal question in a manner inconsistent in principle with this Court's decisions in Griggs v. Duke Power Co., 401 U.S. 424, 430-31; McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273; International Brotherhood of Teamsters v. United States, 97 S.Ct. 1843 (1977); Trans World Airlines Inc. v. Hardison, 97 S.Ct. 2264 (1977); and H. K. Porter Co. v. NLRB, 397 U.S. 99.

Quite apart from the conflict with this Court's recent decisions under Section 703(h) resulting from the override of bona fide seniority systems, the instant case involves the legality, under Title VII, and the constitutionality[20] of

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effect of Section 703(h) on the consent decree and supplemental order.

[20] In our view, the constitutional issue, which was presented to the courts below, need not be decided to invalidate the objectionable portions of the decree and supplemental order, since Title VII provides a sufficient basis for doing so.

Our constitutional argument is based upon the deprivations of jobs caused by the federal government because of race, national origin and sex in violation of the due process clause of the Fifth Amendment. Cf. *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642; *Schneider* v. *Rusk*, 377 U.S. 163, 168; *Bolling* v. *Sharpe*, 347 U.S. 497.

Classification by race (and presumably, national origin and sex) is subject to strict scrutiny, at least where the classification results in detriment to persons of the dispreferred group. Not only must the purpose of the classification serve a "compelling government interest", but it must be demonstrated by rigid scrutiny that

"remedial" employment quotas. This is an issue with which government at all levels has struggled and continues to struggle, and one which greatly concerns employers, unions and the working man and woman in this country.[21] Guid-

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there are no reasonable ways to achieve the government's goals by means which impose a lesser limitation on the rights of the group disadvantaged by the classification. The burden in both respects is upon the government. *Dunn* v. *Blumstein*, 405 U.S. 330, 342-43; *Loving* v. *Virginia*, 388 U.S. 1, 11; *McLaughlin* v. *Florida*, 379 U.S. 184, 192-93. In the instant case, not only is there an absence of any finding by the district court that remedial quotas were required to achieve the government's objective, but the governmental interest involved is diametrically opposed to such preferences. This Court has articulated the pertinent national policy as follows:

> "Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431.

The school desegregation cases do not support the judicial use of quotas in the employment area. Cf. *Swann* v. *Board of Education*, 402 U.S. 1, 22, 23. Racial classifications in public schools do not have the same detrimental effect on non-minorities. Furthermore, in the school desegregation area, the underlying condition of segregation in public schools resulting from legal fiat is unconstitutional. *Brown* v. *Board of Education*, 347 U.S. 483. Therefore, remedies are required purely to eliminate racial imbalance. The same can not be said for employment discrimination where, as Section 703(j) of Title VII makes clear, the fact of imbalance in the work force is not unlawful *per se*. Remedies in these two areas, therefore, must be directed at different purposes and are subject to different legal standards.

[21] The decisions of the lower courts approving employment quota remedies are set out in footnote 5 of the court of appeals' decision (App., pp. 21-22). *Compare*, *Harper* v. *Kloster*, 486 F.2d 1134 (4th Cir. 1973); *NAACP* v. *Allen*, 493 F.2d 614 (5th Cir. 1974); *Lige* v. *Town of Montclair*, 72 N.J. 5, 367 A.2d 833 (1976); *Broiderick* v. *Lindsay*, 39 N.Y. 2d 641, 385, N.Y.S. 2d 265, 350 N.E. 2d 595 (1976). Cf. *Regents of the University of California* v. *Bakke*, 18 C.3d 34, 132 Ca. Rep. 680, 553 P. 1152 (Cal. 1976), *cert. granted*, 97 S.Ct. 1098 (Feb. 22, 1977).

Indeed, different panels of the court below have expressed themselves differently on the matter of remedial employment quotas. In *Commonwealth of Pennsylvania* v. *O'Neill*, 4 FEP Cases 1286 (not officially reported), *affirmed in part, vacated in part on rehearing en banc*, 473 F.2d 1029 (3d Cir. 1973), the Third Circuit stated:

ance is needed from this Court.

Moreover, the decision of the court below approving the use of such quotas—a total of 28,000 times in 1973 and 1974 alone—to deprive identifiable incumbent employees of employment opportunities based purely on their membership in certain race, sex or ethnic groups conflicts with decisions of the Second Circuit. *EEOC* v. *Local 638, Sheet Metal Workers*, 532 F.2d 821 (1976); *Chance* v. *Board of Examiners*, 534 F.2d 993; *modified*, 534 F.2d 1007 (1976).

The Second Circuit distinguishes between remedial quotas used strictly in the filling of entry-level positions, without an adverse impact on incumbent employees, and remedial quotas having the effect of discriminating in reverse against identifiable non-minority incumbents.[22] In

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"Although expressing no opinion on this issue at the present time, we do note that America's progress in its attempt to eradicate racial discrimination is due largely to the generally-felt belief that individuals, regardless of their race, creed, religion, sex, or national origin, should be accorded an equal chance to compete for the opportunities society provides—employment, education, and others—on the basis of individual ability. In our democracy, rights are accorded primarily to individuals, as distinguished from groups. Opening the doors long shut to minorities is imperative, but in so doing, we must be careful not to close them in the face of others, lest we abandon the basic principle of non-discrimination that sparked the effort to pry open those doors in the first place." 4 FEP Cases at 1289-90.

Presidents have dealt with the question, as has Congress subsequent to its passage of the Civil Rights Act of 1964, albeit not definitively. See, e.g., New York Times, Aug. 21, 1963, p. 15 (Pres. Kennedy); New York Times, July 29, 1977, p. 8, col. 5 (Pres. Carter); "Legislative History of the Equal Employment Opportunity Act of 1972 (H.R. 1746, P.L. 92-261)" (Subcomm. on Labor, Comm. on Labor and Public Welfare, U.S. Senate, Committee Print, Nov. 1972), pp. 1017, 1042-74, 1681, 1714-17; H.R. 7555, § 211, 95th Cong. 1st Sess.; Conf. Rep. No. 95-538, p. 22.

[22] The Second Circuit dealt with the issue of remedial employment quotas several times before reaching this resolution of the problem. *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (1973); *Bridgeport Guardians, Inc.* v. *Members of Bridgeport*

Local 638, supra, the court of appeals explained:

> "Hiring quotas deal with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter." 532 F.2d at 828.[23]

Under the test applied in *Local 638*, the consent decree and supplemental order are unlawful in pertinent part. The decree requires, and has resulted in, the denial of specific job vacancies to single, or small groups of, identifiable persons bidding or applying for those opportunities. The decree and supplemental order in the instant case suffer from the additional infirmity that this type of denial has occurred *28,000 times* and, according to AT&T, will recur with even greater frequency.

In *Chance* v. *Board of Examiners, supra*, the court disapproved a lower court order under Title VII which allowed school districts in the City of New York to "excess" Black or Puerto Rican supervisory personnel only to the extent that the percentage "excessed" did not exceed the percentage of those groups living within the district. The court of appeals stated:

> "The relief fashioned by the court below was not designed to benefit only those affected by the employ-

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Civil Service Commission, 482 F.2d 1333 (1973); *United States* v. *Lathers Local 46*, 471 F.2d 408 (1973); *Rios* v. *Steamfitters Local 638*, 501 F.2d 622 (1974); *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (1975). See also *Acha* v. *Beame*, 531 F.2d 648 (1976); *Patterson* v. *Newspaper & Mail Delivers' Union of New York and Vicinity*, 514 F.2d 767 (1975); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652 (1971).

[23] In *Local 638*, the court disapproved of a lower court order insofar as it (1) required the replacement of one representative to the joint apprenticeship committee by a representative from a minority group, and (2) resulted in the establishment of a ratio of white to minority "acceptances" into the apprenticeship program. At the same time, the court affirmed the imposition of a goal with respect to the overall membership in the Local and the apprenticeship program.

> er's prior discriminatory conduct or to insure that the excessing program operated in a non-discriminatory manner. It was intended to insure that there would continue to be a specified quota of Blacks and Puerto Ricans employed in the New York City School system. Our limited approval of the use of racial hiring quotas in such cases as Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission . . . in Vulcan Society of the New York City Fire Department, Inc. v. Civil Service Commission . . . , is not authority for what the district court has done. We were concerned in those cases with discriminatory hiring practices, and the remedial relief which we approved concerned only hiring procedures." 534 F.2d at 998.

The remedial quota feature of the decree and supplemental order in the instant case, clearly conflicts with the Second Circuit's holding in *Chance*.

Approval by the court below of employment quota relief is also inconsistent in principle with decisions of this Court interpreting Title VII, and comes close to an actual conflict with the decisions themselves.[24]

This Court has repeatedly described the purpose of Title VII as an effort to insure that individual employment decisions are made on the basis of the non-discrimination principle, rather than preferential treatment for any racial, sex or ethnic group. This uniform theme runs throughout the Court's Title VII decisions. In *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, the Court stated:

> "Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifica-

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[24] David Copus, former employee of the Equal Employment Opportunity Commission and one of the principal architects of the consent decree and supplemental order (see App., p. 217), has stated,

> "Even apart from Section 703(h), they [*Teamsters* and *United Air Lines*] hold that only identifiable victims of post-Act discrimination which has been timely challenged are entitled to relief." "Impact of Title VIII Rulings on Business," New York Law Journal, July 18, 1977, p. 1, col. 4.

> tions. In short, the Act does not command that any person be hired simply *because he was formerly the subject of discrimination, or because he is a member of a minority group.* Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed." (Emphasis added.)

In *McDonald & Laird* v. *Santa Fe Trail Transportation Co.*, 427 U.S. 273, a case not cited in the opinions of the courts below, the Supreme Court held that an employer violates Title VII if he discriminates *in favor of* a black employee in the application of company disciplinary rules. The Court stated:

> "Title VII of the Civil Rights Act of 1964 prohibits the discharge of 'any individual' because of 'such individual's race,' § 703(a)(1). [Footnote omitted.] Its terms are not limited to discrimination against members of any particular race. Thus, although we were not there confronted with racial discrimination against whites, we described the Act in Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), as prohibiting 'discriminatory preference for any racial group, minority or majority.'" 427 U.S. at 278-79.

See also *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 51 (1974) (Title VII "concerns not majoritarian processes but an individual's right to equal employment opportunities.") And, last Term, this Court stated:

> "The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment and such discrimination is proscribed when it is directed against majorities as well as minorities." *Trans World Airlines, Inc.* v. *Hardison, supra*, 97 S.Ct. at 2275.

The courts below, however, adopted the distinction urged by government plaintiffs and AT&T, between the substantive obligations of the Statute and the equitable remedies authorized thereby, and held that remedial quotas to non-victims of discrimination constitutes proper relief for past discrimination against the racial, sex and ethnic groups to which those victims belong.

Such a distinction is precluded by the language of the remedial provision of Title VII—Section 706(g)—, this Court's discussion of that provision and of the relief available under Title VII, and the recent seniority decisions of this Court. The distinction is also unsound as a matter of general statutory construction. Section 706(g) provides, in pertinent part:

> "*No order of the Court* shall require the admission or reinstatement of an *individual* as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if *such individual* was refused employment or advancement or was suspended or discharged *for any reason other than discrimination on account of race, color, religion, sex or national origin. . . .*" (Emphasis added.)

This provision denies the district courts power to direct the granting of employment opportunities to an individual denied such opportunities for reasons other than race, sex or national origin. *A fortiori*, it restrains the granting of "relief" to an individual who was never refused such opportunities at all.

This Court has described the remedial function under Section 706(g) as follows:

> "Last term's Albemarle Paper Company v. Moody, 422 U.S. 405, consistently with the congressional plan, held that one of the central purposes of Title VII is 'to make persons whole for injuries suffered on account of unlawful employment discrimination.' Id., at 418. *To effectuate this 'make-whole' objective, Congress in § 706(g)* vested broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other relief as the court deems appropriate.'" *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763. (Emphasis added.)

Franks, therefore, recognized that Section 706(g) must be

applied within the scope of its "make-whole objective".

This Court's recent decision in *Teamsters, supra,* makes it explicit that the scope of district courts' remedial power under Title VII is limited to promoting the purpose of the substantive provisions thereof. In *Teamsters,* the Court stated:

> "Analysis of this problem [the right to relief of individual nonapplicant victims of discrimination] must begin with the premise that the scope of a district court's remedial powers under Title VII is determined by the purposes of the Act." 97 S.Ct. at 1869.[25]

See also *H. K. Porter Co.* v. *NLRB,* 397 U.S. 99 (1970).[26]

The distinction adopted by the courts below between rights and remedies is, therefore, inconsistent with congressional intent, as interpreted by this Court.

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[25] The Court in *Teamsters* reiterated, from *Franks,* that a proper selection of remedies under Title VIII is that required to "effect restitution." 97 S.Ct. at 1869. The Court went on to define the responsibility of the district court, as a precondition for granting relief "to make a substantial number of *individual* determinations in deciding which of the minority employees were *actual victims* of the company's discriminatory practices. 97 S.Ct. at 1873. (Emphasis added.)

The Court's opinion (97 S.Ct. 1874 n. 61) also refers to Section 703(j) of the Act in terms which imply that the disavowal of preferential treatment contained therein is a limitation on the remedial powers of courts under Title VII.

[26] "We may agree with the Court of Appeals that as a matter of strict, literal interpretation that section refers only to deciding when a violation has occurred, but we do not agree that that observation justifies the conclusion that the remedial powers of the Board are not also limited by the same considerations that led Congress to enact § 8(d)." *H. K. Porter Co.* v. *NLRB,* 397 U.S. at 107.

The Porter analysis is particularly apposite for Section 10(c) of the NLRA was the model for Title VII's remedial provision, § 706(g). *Albemarle Paper Co.* v. *Moody, supra,* at 419 n. 11. In *Moody,* too, the Court made clear that the discretion vested in district courts by Section 706(g) must be "measured against the purposes which inform Title VII." 422 U.S. at 417.

For the foregoing reasons, it is respectfully submitted that review of the issue of "remedial" employment quotas at this time, and in the instant case, is most appropriate. Lower courts are in disagreement on the issue, with the Second Circuit squarely in conflict with the decision below; this Court has come to the threshold of deciding the issue in its recent decisions under Title VIII; and in *Regents of the University of California* v. *Bakke*, 18 C.3d 34, 132 Ca. Rep. 680, 553 P.2d 1152 (Cal. 1976), *cert. granted*, 97 S.Ct. 1098 (Feb. 22, 1977), the Court has agreed to review a similar issue in the context of higher education. The "remedial" quotas in the instant case concededly act to the detriment of substantial numbers of employees, and as formulated in the consent decree and supplemental order, are intended by government agencies to serve as a model for similar remedies in the future.[27]

III. In approving a decree and supplemental order which abrogate the terms of collective bargaining agreements and dictate the terms of mandatory subjects of collective bargaining, although not required to remedy violations of Title VII or Executive Order 11246, the court of appeals' decision (a) conflicts with a decision of the Fifth Circuit; and (b) is inconsistent in principle with this Court's decisions regarding the accommodation of the national labor and equal employment opportunity policies, in Emporium Capwell Co. v. Community Organization, 420 U.S. 50, and Trans World Airlines, Inc. v. Hardison, 97 S.Ct. 2264 (1977).

The decision of the court below not only represents an approval of "remedial" quotas to the detriment of thousands of innocent incumbent employees, but undermines

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[27] Quotas afforded to certain racial, ethnic or sex groups can only result in demands for similar treatment by other groups. See, e.g., report of U.S. Department of Labor regarding its intent to publish regulations requiring "goals and timetables" for women in the construction industry. BNA Construction Labor Report, Aug. 3, 1977, p. A-14; New York Times, Aug. 11, 1976, p. 1, col. 4.

unnecessarily the collective bargaining agreements and relationships under which they work. This is because the consent decree and supplemental order, in several respects, unilaterally override the terms of collective bargaining agreements, or dictate mandatory subjects of bargaining, by providing "relief" which is neither required to comply with Title VII (or Executive Order 11246), nor to remedy violations thereof.

The issue presented is not whether those provisions of the decree and order are judicially approvable where plaintiffs, the Company and the Unions agree. Rather, the issue is whether such provisions are approvable over the objections of the collective bargaining representatives.

First and foremost among the objectionable provisions which unnecessarily undermine collective bargaining are, of course, the "remedial" employment quotas discussed *supra*. Nowhere did the district court find that such quotas *were required* to remedy the discrimination alleged by government plaintiffs in their complaint, nor that the relief elsewhere provided in the decree and not objected to by the Unions, or alternative relief, would not adequately remedy such discrimination.

There are other objectionable provisions in the decree and supplemental order which suffer from the same deficiency, and which were brought to the attention of the courts below.[28] Among these is the unilateral establishment in the decree of an upgrading and transfer plan as the procedural device for filling vacancies thereunder (App., p. 123; Exhibit B to consent decree ("A Model Upgrading and Transfer Plan")).[29] And while the decree

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[28] None of those objections were addressed in the opinion of the court below.

[29] In the district court, the IBEW Council objected to the following additional provisions of the supplemental order:

(1) its open-ended nature in terms of duration (App., p. 147);

provides, as regards those provisions[30] that it is not "intended to restrict the right of the Bell Companies and the collective bargaining representatives of their employees to negotiate alternatives to the provisions of this Decree which would also be in compliance with federal law" (App., p. 139),[31] this misses the point insofar as the law of collective bargaining is concerned. The duty to bargain under the National Labor Relations Act extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.

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(2) the granting of preferences for "deficient group" members who were not personally denied rights provided in the decree (App., pp. 148, 150-41);

(3) the provisions of an absolute preference for "deficient group" members during the period following the entry of the supplemental order until the effective date of the carry-forward procedure (App., p. 152-53);

(4) the provision for the use of seniority override "at any point in a quarter when [defendant companies] conclude that such use is necessary to meet intermediate targets" (App., p. 159);

(5) the inadequate nature, and timing, of information required to be submitted to the appropriate collective bargaining representative (App., pp. 161, 164-66);

(6) the exemption afforded the "posting and bidding" companies from posting vacancies, where, in the companies' judgments, the individual(s) entitled to priority placement are "identified pursuant to the" order (App., p. 152 n. 6);

(7) the requirement that the companies take "corrective action to assure that employees respect the rights of fellow employees" to seek and hold non-traditional jobs (JA 153).

[30] Contrary to the lower court's opinion (App., p. 25), the decree does not preserve to the unions the right to negotiate alternatives to the quota provisions thereof. This has always been the understanding of the parties to the decree, is implicit in the decision of the district court, and is reflected by the subsequent refusal of those parties to permit the Unions to participate in negotiating provisions in the supplemental order to remedy alleged deficiencies in the meeting of the quotas.

[31] The same paragraph of the decree previously provides, however, that "all of the Bell Companies' obligations in this Decree are required for compliance with Federal law" (App., p. 139).

During this period, an employer may not unilaterally change the terms and conditions of employment subject to collective bargaining, without first engaging in collective bargaining negotiations. *NLRB* v. *C&C Plywood Corp.*, 385 U.S. 421.[32] It is a violation of the collective bargaining obligation for an employer first to make a unilateral change and then to indicate his willingness to negotiate concerning the matter. It follows that in the absence of a requirement imposed by Title VII or some other provision of federal law for the precise provisions contained in the decree and supplemental order, their unilateral adoption was an impermissible incursion on the collective bargaining process.

In *Emporium Capwell Co.* v. *Community Organization*, 420 U.S. 50, 69, this Court refused to allow to be confused "the employees' substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights." The Court stated:

> "Whether [such rights] are thought to depend upon title VII or have an independent source in the NLRA [footnote omitted] they cannot be pursued at the expense of the orderly collective bargaining process contemplated by the NLRA." 420 U.S. at 69.

Emporium Capwell holds that the National Labor Relation Act protects only the right of the collective bargaining representative to bargain with employers over issues of employment discrimination. The rationale of the decision is that the national labor policy and the policy promoting equal employment opportunity are both important national policies, neither of which should be pursued at the expense of the other. Yet the effect of the court of appeals' decision in the instant case is to permit widespread interference with collective bargaining agreements and relationships in

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[32] This is true for practices already governed by collective bargaining agreement as well as those not so governed. *N.L.R.B.* v. *Katz*, 369 U.S. 736; *Longhorn Machine Works, Inc.*, 205 NLRB 685, 688-90 (1973).

the absence of a district court finding that this interference is *necessary* to comply with Title VII or Executive Order 11246.

The decision of the court below is also inconsistent in principle, on the same basis, with *Trans World Airlines, Inc.* v. *Hardison*, 97 S.Ct. 2264, where the Court refused to require an employer to violate a collective bargaining agreement where Title VII did not clearly and expressly impose an obligation to do so. The Court stated:

> "We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, [footnote omitted] but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances." 97 S.Ct. at 2274.

The Fifth Circuit has held that, in their fashioning of remedies for violations of Title VII, district courts should not interfere unnecessarily with the right of a union to negotiate terms and conditions of employment. *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837 (5th Cir. 1977), *reversed and vacated in part on other grounds, affirmed in part, and remanded*, No. 75-2201 (5th Cir. July 29, 1977). In *Myers*, the defendant unions objected to certain portions of a consent decree negotiated, over their objections, by plaintiffs and defendant companies. Those provisions, like the objectionable provisions unilaterally agreed to in the instant case, conflicted with provisions of the unions' collective bargaining agreements, or practices thereunder. The court stated:

> "The issue here is the proper accommodation by the

> district court of national policies underlying the NLRA and Title VII. On that issue we have held that before ordering or approving changes in a collective bargaining agreement, the court must find that the modifications are *necessary*. . . ." 544 F.2d at 859.

Myers recognized that,

> "There are enormous gray areas in the range of remedies for past Title VII violations. . . . Beyond [certain necessary remedies] are gray areas where it is not to be presumed that minority-proposed changes are required under the rightful place doctrine. In addition, there are gray areas within the [required] categories where fine questions of wording and implementation are involved. Where a union has made a serious attempt to bring the labor contract into full compliance with Title VII, as is clear here, a court should defer to the union's bargain for remedies in the gray areas unless the discriminatees prove that specific changes are necessary in order for them to reach their rightful place." 544 F.2d at 858-59.[33]

In the instant case, the Unions were given no opportunity to invoke the collective bargaining process before the unilateral adoption of the unnecessary remedies embodied in the quota and other objectional features of the decree and supplemental order.

The lower courts' approval of the remedies not shown to be necessary under legally correct Title VII remedial concepts "greatly derogates from the unions' role under the NLRA and must be reversed." *Myers, supra,* at 834.

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[33] Interestingly, one of the remedies regarded as necessary by the Fifth Circuit—the adoption of a posting and bidding system as the mechanism for alloting job opportunities (544 F.2d at 856)—is one of the very provisions which the Unions urged in lieu of the unilaterally-adopted "upgrade and transfer" procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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ADDENDUM

STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended: Sections 703(a), (h), (j) and 706(g)

The pertinent portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq., are as follows:

Section 703(a), 42 U.S.C. § 2000e-2(a), provides:

> "It shall be an unlawful employment practice for an employer—
>
> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Section 703(h), 42 U.S.C. § 2000e-(h), provides:

> "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not de-

signed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. (206(d))."

Section 703(j), 42 U.S.C. § 2000e-2(j), provides:

"Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area."

Section 706(g), 42 U.S.C. § 2000e-5(g) provides, in pertinent part:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the

unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)."

Executive Order 11246

The pertinent portions of Executive Order 11246 are as follows:

Section 202(1) and (2), provides:

"Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

'During the performance of this contract, the contractor agrees as follows:

'(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, with regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

'(2) The contractor will, in all solicitations or ad-

vertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.' "

Section 207 provides:

"The Secretary of Labor shall use his best efforts, directly and through contracting agencies, other interested Federal, State, and local agencies, contractors, and all other available instrumentalities to cause any labor union engaged in work under Government contracts or in any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or any other provision of Federal law."

Section 209 provides, in pertinent part:

"(a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may:

* * *

"(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of his Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

"(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964."

Constitution of the United States: Fifth Amendment

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ."

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

This brief is intended to bring to the Court's attention the Fifth Circuit's recent decisions in *Weber* v. *Kaiser Aluminum & Chemical Corporation,* 563 F.2d 216 (November 17, 1977), and *United States* v. *East Texas Motor Freight System, Inc.,* 564 F.2d 179 (December 5, 1977).

In *Weber,* the Court held (one judge dissenting) that neither private parties, nor a federal district court acting pursuant to Title VII of the Civil Rights Act of 1964, as amended, may provide for racial preferences in the admission of employees to a craft training program, in the absence of a finding of prior discrimination against the persons to be benefitted by such "relief".

"There can be no basis for preferring minority workers if there has been no discriminatory act that displaced them from their 'rightful place' in the employment scheme....

• • •

"In the absence of prior discrimination a racial quota loses its character as an equitable *remedy* and must be banned as an unlawful racial *preference* prohibited by Title VII, §703(a) and (d). Title VII outlaws preferences for any group, minority or majority, if based on race or other impermissible classifications,[14] but it does not outlaw preferences favoring victims of discrimination. A minority worker who has been kept from his rightful place by discriminatory hiring practices may be entitled to preferential treatment 'not because he is Black, but because, and only to the extent that, he has been discriminated against.' *Chance* v. *Board of Examiners*, [534 F.2d 993,] 999 [(2d Cir. 1976), *cert. denied*, —U.S.— , 97 S.Ct. 2920]." 563 F.2d at 221, 224-25. (Emphasis in original.)

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[14] "*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430-31, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971)."

In *East Texas Motor Freight*, the Fifth Circuit vacated a lower court order which awarded retroactive seniority relief on a class rather than on an individual basis. The relief included some seniority dates prior to the effective date of Title VII. The Court stated:

"It appears that, as indicated before, even after the *Teamsters* decision some retroactive seniority relief can properly be granted to 'individual employees' under Title VII (97 S. Ct. at 1865), if the necessary showing of post-Act discrimination is made and other evidence adduced. The difficulty on the present record is that the case was not tried as to individual employees

> and no distinction was made as to pre-Act and post-Act discrimination as to them. As counsel for plaintiffs explained at one point: 'we have not put up proof on trial specifically for them, but it is also true, as the Court of Appeals for the Fifth Circuit has held in *United States versus Time DC* just recently, it would be ridiculous because of the very nature of a Title 7 lawsuit to put on proof on each and every specific individual' (Minutes, October 3, 1975 hearing, p. 18). *All this, of course, has been changed by the Teamsters decision.*" 564 F.2d at 183. (Emphasis added.)

In both *Weber* and *East Texas,* the Court also held that "relief" which may not properly be awarded under Title VII may not be provided under Executive Order 11246, inasmuch as the Executive Order does not provide an independent legal basis for "relief" not sanctioned by the Statute. "[E]xecutive orders may not override contradictory congressional expressions." *Weber* (563 F.2d at 227).

> "Moreover, the Supreme Court in *Teamsters* (97 S. Ct. at 1869) emphasized earlier decisions that Title VII courts had been given broad equitable powers so as to enable them to give the 'most complete relief possible'. In this context, relief was limited to identified victims for whom the necessary showing could be made. If such relief is the 'most complete . . . possible', the Executive Order could scarcely be interpreted to demand more." *East Texas* (564 F.2d at 185).

These rulings in *Weber* and *East Texas* establish a conflict between the Fifth and Third Circuits on the question whether relief under Title VII, including the provision of racial preferences, is limited to actual victims of discrimination, as well as on the underlying issue involving the Executive Order discussed in footnote 19 of the petition for

certiorari. *Weber* and *East Texas,* therefore, provide further support for granting the petition, and setting down the case for plenary consideration.

Respectfully submitted,

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v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL., RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

This brief is intended to bring to the Court's attention the Fourth Circuit's recent decision in *White* v. *Carolina Paperboard Corp.*, — F.2d —, 15 EPD ¶ 7843 (Sept. 23, 1977), and to respond to misleading assertions of fact in the Brief in Opposition of Federal Respondents.

1. The Government's brief (pp. 7, 23 n. 27) erroneously implies that the consent decree allows AT&T and the Unions "to negotiate alternatives" to the remedial quota ("override") provisions of the consent decree. It fails to mention the statement in the decree that "All of the Bell Companies' obligations in this Decree are required for compliance with Federal law" (App. 139), and the fact that the parties to the decree consistently have viewed the quota provisions

as not subject to change through collective bargaining.

2. In *White v. Carolina Paperboard Corp.*,—F.2d —, 15 EPD ¶ 7843 (Sept. 23, 1977), the Fourth Circuit, "agree[ing] with the observation of the Second Circuit which recognized a quota's potentially harmful impact on the work force" (15 EPD at p. 6219), declined to approve the imposition of remedial quotas "where, as here, adequate relief can be obtained without their use" (15 EPD at 6219). Notwithstanding the Government's implication to the contrary (brief, p. 23 n. 27), the fact remains that the district court here did *not* make a finding that quota relief was *required* to remedy the violation.

3. The Government's attempted distinction (brief, p. 23 n. 27) of *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 858-59 (5th Cir.) is based on a misleadingly stated premise, at least insofar as this petitioner is concerned. As in *Myers,* this petitioner sought to invoke the collective bargaining process prior to the entry of the AT&T consent decree for the specific purpose of negotiating alternatives to remedial quotas. This effort was spurned by the Goverment (and AT&T) who limited petitioner's role to one of discussions with the Government. Even in that relegated status,* petitioner suggested language for other provisions of the decree which were accepted and incorporated therein. Those

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* That status was the basis for the district court's exaggerated characterization, at an earlier stage of this litigation, of this petitioner's role as a full party to the "settlement . . . hammered out" (365 F. Supp. 1105, 1108). See also AT&T's letter to the Clerk of this Court, dated October 26, 1977, modifying p. 20 n. 23 of its brief.

provisions (App. 126-128) establish the right of employees to compete for promotion, transfer, lay off and recall on the basis of company-wide seniority, and limit "residency" qualifications for promotion and transfer. The non-quota provisions of the decree, we submit, constitute adequate relief for victims of discrimination, and the district court did not find to the contrary.

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UNITED STATES DEPARTMENT OF LABOR,
UNITED STATES OF AMERICA,
AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH COMPANY *ET AL.* TO SUPPLEMENTAL BRIEF FOR PETITIONER

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IN THE

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REPLY BRIEF OF RESPONDENTS AMERICAN TELEPHONE AND TELEGRAPH COMPANY *ET AL.* TO SUPPLEMENTAL BRIEF FOR PETITIONER

In its most recent brief, petitioner Telephone Coordinating Council TCC-1, International Brotherhood of Electrical Workers ("IBEW" hereinafter) urges further support for its petition in the two recent decisions of the Fifth Circuit: *Weber v. Kaiser Aluminum & Chemical Corporation,* 563 F.2d 216 (1977),[1] and *United States v. East Texas Motor Freight System, Inc.,* 564

[1] Petitions for Rehearing *en banc* will be filed in the *Weber* case by Kaiser and by the intervenor, EEOC, on January 15, 1978.

F.2d 179 (1977). Relying on those cases, IBEW reargues its contention that the "override" remedy provided by the consent decree in this case was improper because it provides seniority relief to persons who were not identifiable victims of discrimination.

AT&T has previously refuted this argument in its Brief in Opposition to IBEW's Petition for Writ of Certiorari. The two Fifth Circuit opinions alter neither the Company's position nor the correctness of the decision of the Third Circuit in this case.

First, IBEW ignores the factual basis for the *Weber* decision: the district court found in that case that there was *no evidence of past discrimination.* 415 F. Supp. 761, 764 (E.D. La. 1976). Although this finding was disputed by the dissenter from the opinion on appeal, the panel majority upheld the trial court's decision enjoining a voluntary agreement entered into by Kaiser providing for a minority quota in selecting employees for a craft training program because of the "absence of prior discrimination." 563 F.2d at 224. Accordingly, the district court (and the Fifth Circuit) proceeded to evaluate the program from an entirely different premise than did the district court (and the Third Circuit) in this case. Here, the district court, in light of the evidence before it, including the voluminous record in the Federal Communications Commission proceeding, explicitly accepted as true the allegations of across-the-board discrimination against AT&T and its operating companies. 419 F. Supp. 1022, 1039-1040 (E.D. Pa. 1976).

The *East Texas* case also arose in a different posture. It was a fully litigated case, much like *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). In addition, the relief provided was a comprehensive seniority remedy intended to eliminate the past effects of an allegedly discriminatory seniority system. Each of these facts presents a critical distinction from the *AT&T* case. First, for the reasons stated in the Company's Brief in Opposition,[2] the order of proof set up by this Court in *Teamsters* is inapposite in a settlement context. Once again, IBEW is trying to force the consent decree into an improper mold.

Moreover, the "override" aspect of the decree constitutes prospective class relief intended to achieve the prophylactic objectives of Title VII. It is not designed to provide "make

[2] Brief in Opposition at 13-14.

whole" relief for any particular individual. In that respect, too, it differs from the relief initially formulated in *East Texas,* where retroactive seniority relief was awarded to individual employees who were presumed to have been discriminated against by an unlawful seniority system. Under the AT&T decree, the seniority system was not challenged,[3] and no beneficiary of the override obtains constructive seniority for any future purpose.

Finally, the instant case does not present a conflict with the Fifth Circuit's interpretation of Executive Order 11246 since the remedy here was properly fashioned pursuant to the district court's equitable powers under Title VII.

In light of the foregoing, AT&T respectfully submits that the decisions of the Fifth Circuit provide no new reasons to support IBEW's petition in this case and detract in no way from AT&T's position that the petition should be denied.

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[3] 419 F. Supp. at 1037.